Supreme Court, U.S.
FILED
941438 FEB 27 1995
OFFICE OF THE CLERK

NO.

in the

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1994

ROBERT LINCOLN FOWLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jana V. Jay
4532 E. Tamiami Trail
Naples, Florida 33962
(813) 774-1400

61 pp

QUESTIONS PRESENTED

WHETHER THE ELEVENTH CIRCUIT'S DECISION THAT THE ERRONEOUS ADMISSION OF FOWLER'S POST-ARREST STATEMENTS WAS HARMLESS ERROR UTILIZES A STANDARD OF REVIEW THAT DEVIATES SUBSTANTIALLY AND MATERIALLY FROM THE CONSTITUTIONAL HARMLESS ERROR STATUTE AS IT HAS EVOLVED IN DECISIONS RENDERED BY THIS COURT, SUCH THAT THE ELEVENTH CIRCUIT'S REFORMULATED HARMLESS-ERROR STANDARD IS INCONSISTENT WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

WHETHER THE ELEVENTH CIRCUIT'S FAILURE TO CONSIDER AND RULE APPROPRIATELY ON FOWLER'S ARGUMENT THAT HE WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE GOVERNMENT'S DOYLE VIOLATION CONFLICTS WITH DECISIONS OF THIS COURT.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION 1

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE FACTS 3

STATEMENT OF THE CASE 5

ARGUMENT FOR ALLOWANCE OF THE WRIT 9

CONCLUSION 17

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Arizona v. Fulminante, 499 U.S. 279,
111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 11

Brecht v. Abrahamson, ___ U.S. ___,
113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) 8, 12, 13

Chapman v. California, 386 U.S. 18,
87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 8, 10-12

Coleman v. Singletary,
30 F.3d 1420 (11th Cir. 1994) 13

Doyle v. Ohio, 426 U.S. 610,
96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) .. 12, 15, 16

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880 (1981) 14

Fahy v. Connecticut, 375 U.S. 85,
84 S.Ct. 229, 11 L.Ed.2d 171 (1963) 10-12

Harryman v. Estelle,
616 F.2d 870 (5th Cir. 1980) 10, 14

Owens v. Alabama,
849 F.2d 536 (11th Cir. 1988) 13

Passman v. Blackburn,
797 F.2d 1335 (5th Cir. 1986) 16

Satterwhite v. Texas, 486 U.S. 249,
100 L.Ed.2d 284, 108 S.Ct. 1792 (1988) .. 11, 12

Sullivan v. Louisiana,
124 L.Ed.2d 182 (1993) 11

United States v. Beale,
921 F.2d 1412, (11th Cir.), *cert denied*, ___ US ___, 112 S.Ct. 100, 116 L.Ed.2d 71 (1991) . 9, 10, 12, 13

United States v. Hale, 422 U.S. 171, 180,
95 S.Ct. 2133, 2138, 45 L.Ed.2d 99 (1975) 16

United States v. Pena,
897 F.2d 1075 (11th Cir. 1990) 17

United States v. Rosenthal,
793 F.2d 1214 (11th Cir. 1986) 16

United States v. Shaw,
701 F.2d 367 (5th Cir. 1983) 16

United States v. Quiroz,
13 F.3d 505 (2nd Cir. 1993) 14

NO.

in the

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1994

ROBERT LINCOLN FOWLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT LINCOLN FOWLER, defendant and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in this proceeding on July 29, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reproduced and attached hereto in the Appendix at pages App. 9 et seq., was entered on July 29, 1994. It is reported at 26 F.3d 1533.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit was entered on July 29, 1994. Certain of the defendants/appellants filed petitions for rehearing; the court denied those petitions by its order dated October 18, 1994. FOWLER filed a motion for reconsideration of the petition for rehearing; the court denied that motion on November 28, 1994. This petition for writ of certiorari was filed within ninety days after entry of the order denying the said petitions for rehearing and motion for reconsideration. The jurisdiction of this court is invoked pursuant to 28 United States Code §1254 and Supreme Court Rule 10.1(c).

CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

Between March 7, 1990 and April 18, 1990 certain meetings and negotiations were held in Miami, Florida, Honduras, Pensacola, Florida, and Baldwin County, Alabama between agents of the U.S. Customs service working in an undercover capacity, a Honduran informant, and certain of the appellants. Fowler was not involved in any of those meetings and negotiations. As a result of those meetings and negotiations, on April 18, 1990, packages that purported to be approximately 500 kilograms of cocaine were ordered by the U.S. Attorney from the Drug Enforcement Administration laboratory in Dallas, Texas. The packages and fifteen-odd armed agents posing as Customs Agent Lawrence Winberg's drug associates were in a barn on a pecan farm in rural Baldwin County, Alabama that had been designated as the delivery site. (R 18-1043, 1044). The trial judge noted that there was no evidence that Fowler was involved in the offense until the day he was arrested. (R 20-1545)

Co-defendant Irving Schwartz told Agent Winberg that he thought two horse trailers were to be involved in the transport (R 17-892). Later, at the truck stop that served as a rendezvous point, Schwartz told U.S. Customs Service Agent James Tanner that there would be two large trucks and a small car, the latter with a secret compartment that could carry sixty kilos (R 18-1019). From the rendezvous point Agent Kyle Barnette led certain of the defendants to the barn (R 18-1023). Once there, first an International tractor-trailer, then a Kenworth truck, were backed in. A Nissan mini-van was parked to the side of the International (R 18-1023). The government's refrigerator truck that held duffle bags containing narcotics was already present when the defendants arrived. Agent Tanner did not see how many people occupied the mini-van *en route* to the barn, nor did he see who got out of it (R 18-1022, 1035). Some of the

undercover agents were tossing duffle bags on the ground behind the refrigerator truck. Defendants Kalinowski and DeGiso took out and counted the packages. Defendants Deatherage and Ruiz were in the vicinity. Defendants Fernandez, Diaz, Rodriguez, and Pastor were tending to their respective trucks. According to Agent Tanner, the International was being loaded with duffle bags, and some packages were allocated to the Kenworth (R 18-1094, 95). No packages were placed near or allocated to the Nissan (R 18-1065). Agent Tanner had initially observed Fowler mingling around for a few minutes, and then getting underneath the Nissan (R 18-1092). The packages were was unloaded from the government truck after Fowler got under the car (R 18-1093). Tanner said about Fowler that "he was underneath the car this entire time and he was working underneath the car. He made a comment after some time that he needed a flashlight or some tools to get into this compartment" (R 18-1027). DeGiso told Fowler to get out from underneath the car (R 18-1029). Fowler did not touch any packages (R 18-1093).

U.S. Customs Service Agent Lamplough's primary location was immediately at the back of the undercover truck (R 18-1025). Lamplough's attention was focused primarily on anything that went on right outside the back of the refrigerator truck (R 18-1126). He was approximately fifteen to twenty feet away from the Nissan most of the time (R 18-1117). It was hard to hear conversations in the barn twenty feet away; the barn was loud and there were people talking (R 18-1146). Agent Lamplough said the people in his immediate area were Kalinowski, Ruiz, Deatherage, and Agent Pagget (R 18-1143). Agent Lamplough said Fowler kept asking for tools and assistance, that Fowler told him, outside of and not under the vehicle, and while asking for tools, that he was attempting to open a secret compartment that would hold sixty kilos (R 18-1148). Agent Kyle Barnette, the only agent to wear a wire at the barn was within five or six feet of the Nissan (R 18-1144). He reflected Fowler as saying

PUBLISHER'S NOTE:

The following page is unavailable for filming;

5 & 6

Nissan from various angles, including the underside (R 19-1348, 1356). The vehicle was registered to John Stamp (sic), and a receipt for title and tags found in the glove compartment (R 19-1359). The witness said the car had normal undercoating, and that one could not tell if the compartment was normal or not (R 19-1361).

The trial court denied Fowler's renewed motion to suppress (R 19-1436). Over objection, Agent Dwight McDaniel testified at trial that Agents Booker and Reyard were in the interview room with Fowler. He asked if Fowler had been Mirandized and then asked if Fowler understood his rights to remain silent and his right to an attorney. He said that Fowler said that he did (R 18-1147, 1150). McDaniel said no one attempted to induce or coerce Fowler; that he was asked to cooperate and replied that he couldn't, he didn't know anything or anybody and was paid to be blank. He said he was just driving someone up from Miami, was a chauffeur, and would rather not say for whom. Fowler said he was sorry he got greedy. McDaniel did not know Fowler had invoked his Miranda rights; he was only told Fowler had been read his rights (R 18-1150).

Fowler's fiancée testified that they both live in a rural area near Naples, Florida (R 20-1652). She stated that Fowler was skilled with tools and had a lot of them. She told the jury that he visited his mother in Gainesville, Florida on April 10, 1990. Her telephone bills reflected he was in Gainesville, and they last spoke Naples-to-Gainesville on April 16 (R 20-1659). She had never seen the Nissan. She said Naples was in the 813 area code region [none of the telephone records introduced at trial reflected the 813 area code]. She did not know any of the co-defendants (R 20-1659).

During closing arguments, Fowler's attorney argued that Fowler's lack of tools and his inexplicable bumbling in the dark under the Nissan was just as indicative of attempting to make the best of a bad situation as became apparent to him at the farm. In her rebuttal, the

prosecutor capitalized on Fowler's statements. She argued to the jury "He also confessed. He admitted his guilty knowledge. He said he was paid to be blank and he got greedy.... He was not a victim of circumstances. He was a victim of his own greed." She said with particular reference to Fowler "[t]here is no evidence that anyone present was just relieved and thrilled to see the police officers as an innocent person might be under those" -- at which point Fowler's attorney objected but reserved argument so as to minimize the disruption to the government's closing. She continued "There is no evidence that anyone said, thank goodness you're here. How can I help you? In his statement he said, somebody paid me to drive. I don't want to say who. Somebody paid me, I don't want to say who did that. I was paid to be blank. I'm sorry, I got greedy. He can't have it both ways, because if he was -- well, you can't have it both ways." (R-2079, 2080).

Fowler's motion for dismissal pursuant to Rule 29 was granted as to counts two and three. The jury returned its verdict on October 5, 1990. The jury acquitted Fowler of counts one and four, but returned a guilty verdict on count five, possession with intent to distribute.

Fowler was sentenced on December 19, 1990 to a mid-range term of incarceration of 328 months. The panel found that the admission of Fowler's post-arrest statements, if error, was harmless error. Fowler petitioned for rehearing and suggested rehearing *en banc*, urging that the standard of review used on direct review by the Eleventh Circuit was the equivalent of the *Brecht v. Abrahamson* standard applicable in collateral review, and that the panel's two-prong approach deviated substantially and materially from the constitutional harmless error standard that is applicable in direct review of error of a constitutional magnitude, as enunciated in *Chapman v. California*. The Court denied the relief prayed for on October 18, 1994. Having moved for leave to submit additional authority after submission of his petition for

rehearing, which motion was still pending at the time of entry of the order denying his petition for rehearing and suggestion of rehearing *en banc*, Fowler moved for reconsideration after the October 18, 1994 order was entered. Fowler urged that the court frequently and erroneously applies a more stringent standard of review of constitutional error in habeas corpus matters, where relief is granted to violent offenders, than it does to review of constitutional error on direct review, notably in narcotics offenses. On November 28, 1994 the court granted Fowler's motion for leave to file supplemental authority but denied his motion for reconsideration.

ARGUMENT FOR ALLOWANCE OF THE WRIT

WHETHER THE ELEVENTH CIRCUIT'S DECISION THAT THE ERRONEOUS ADMISSION OF FOWLER'S POST-ARREST STATEMENTS WAS HARMLESS ERROR UTILIZES A STANDARD OF REVIEW THAT DEVIATES SUBSTANTIALLY AND MATERIALLY FROM THE CONSTITUTIONAL HARMLESS ERROR STATUTE AS IT HAS EVOLVED IN DECISIONS RENDERED BY THIS COURT, SUCH THAT THE ELEVENTH CIRCUIT'S REFORMULATED HARMLESS-ERROR STANDARD IS INCONSISTENT WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

Applying a standard set out in *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir.), *cert denied*, ___ U.S. ___, 112 S.Ct. 100, 116 L.Ed.2d 71 (1991), the Eleventh Circuit set out a two-fold test: (1) to examine the effect the erroneously admitted statement had upon other evidence introduced at trial and upon the conduct of the defense, and (2) to determine if, absent the illegal statement, the remaining evidence is so overwhelming to establish guilt

beyond a reasonable doubt, that the admission of the statement is harmless. *Beale*, 921 F.2d at 1435. This test represents a substantial and material departure from the constitutional harmless error standard applicable on direct review, as defined by the Supreme Court of the United States.

The *Beale* decision cites *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980) as authority for its two-prong test, based upon language extracted from *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). *Fahy* does in fact stand for the proposition that one does not examine constitutional error in isolation, but that is not the sole factor in whether constitutional error is harmless beyond a reasonable doubt. *Fahy* and Supreme Court decisions that have examined harmless error analysis all acknowledge that it is the burden of the government to demonstrate beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the verdict obtained. The *Harryman* court correctly rejected the appellant's contention that an improperly admitted statement must be considered in isolation; that rejection had no impact on the statement in *Fahy* that "a constitutional error in the admission of evidence cannot be said to have been harmless if there is "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id* at 86-87, 84 S.Ct. at 230." *Harryman* at 876.

The constitutional harmless error standard was revisited shortly after *Fahy* in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The court declined to hold that all federal constitutional errors must always be deemed harmful; concluding instead that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless...." *Id* at 22. The burden of demonstrating such unimportance and insignificance is on the government: "An error in admitting plainly relevant

evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id* at 23, 24.

More recently, this court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) applied the harmless-error analysis to coerced confessions, citing *Chapman*, "that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court has the power to review the record de novo in order to determine an error's harmlessness. See *ibid.*; *Satterwhite v. Texas*, 486 U.S. at 258, 100 L.Ed.2d 284, 108 S.Ct. 1792. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession ... did not contribute to [the] conviction." *Id* at 295, 296. *See Arizona v. Fulminante*, ___ U.S. ____, ___, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 284 (1988); *Satterwhite v. Texas*, 486 U.S. 249, 258-59; 108 S.Ct. 1792, 1798, 100 L.Ed.2d 284 (1988))("The question ... is not whether the legally admitted evidence was sufficient to support the death sentence, ... but, rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

In *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993) the Court revisited the analysis in the context of deciding that a constitutionally-deficient reasonable doubt instruction is not amenable to harmless-error analysis. Writing for a unanimous court, Justice Scalia said, in pertinent part to the harmless-error analysis, that the question instructed by *Chapman* for consideration by the reviewing court is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.... (cites omitted).... The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty

verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. *Id* at 189.

During the same term, this Court considered whether the *Chapman* analysis should be applicable to a *Doyle* violation on collateral review. In *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993) this court implicitly acknowledged that reversal is required where there is a reasonable possibility that trial error contributed to the verdict.

The United States Supreme Court has never receded from the stringent review initially set out in *Fahy* and *Chapman*. Although *Fulminante* established the trial-error/structural-error categories of constitutional error, it did in no way water down the constitutional harmless error standard of review. *Beale*'s conclusory two-prong analysis falls short of the mark. The first prong--examination of the effect of the erroneously admitted statement upon the other evidence and upon the conduct of the defense--correctly restates that a harmless-error analysis does not isolate the erroneously admitted evidence, but merely establishes the framework within which the analysis is conducted. The second prong overlooks two constants enumerated by the Supreme Court--that the burden is on the government to prove beyond a reasonable doubt that the erroneous admission did not contribute to the verdict, and that that erroneous admission cannot possibly have contributed to the verdict. *Satterwhite v. Texas* authorizes a reviewing court to review de novo to determine whether an erroneous admission was harmless, but it does not authorize a reviewing court to dilute the standard of review by omitting considerations that have consistently been weighed with significance on Supreme Court review.

It should not be the law that defendants in cases on direct review, and notably in narcotics cases, are accorded a standard of review inferior to that which is applied to collateral proceedings, and notably with regard to violent offenses. In the Eleventh Circuit, however, such is the

case. On September 8, 1994 the Eleventh Circuit decided *Coleman v. Singletary*, 30 F. 3d 1420 (11th Cir. 1994). That case is significant for the purpose of analyzing Judge Johnson's opinion in this action in that Judge Johnson's dissent in *Coleman*, when read with his opinion in *Owens v. Alabama*, 849 F.2d 536 (11th Cir., 1988) indicates that the protection offered to the constitutional rights of a petitioner proceeding under 28 U.S.C. §2254 is greater than that which was accorded to Fowler in the instant case. Both *Coleman* and *Owens* involved crimes where the defendants had taken the life of another person; Coleman had strangled his ten year old sister and Owens had emptied a shotgun at an on-duty uniformed police officer. Both *Coleman* and *Owens* dealt with admission of statements after equivocal *Miranda* invocations, whereas Fowler's invocation was unequivocal.

Perhaps the Eleventh Circuit considers that state courts of Alabama and Florida are incapable of protecting citizens of those states from the actions of overzealous law enforcement officers without its oversight, or perhaps the Eleventh Circuit considers the provincial bench to be more prone to commit and permit error that is not harmless. One thing is certain--if the *Beale* test was to be applied in *Owens*, the Eleventh Circuit surely would have sanctioned admission of Owens's incriminating braggadocio.

This Court must address why the correct, constitutional harmless error standard of review is utilized in direct appeals to no apparent avail in narcotics cases where there is a pure *Miranda* invocation, yet the less stringent *Brecht v. Abrahamson* 113 S.Ct. 1710 (1993) standard provides collateral relief to violent felons convicted of heinous crimes where the *Miranda* invocation is precatory. It is <u>not</u> appropriate for the Eleventh Circuit to continue to afford a more stringent standard of review to the §2254 petitioner than for a party whose matter is before the court on direct appeal.

Agent Booker, who arrested Fowler and

administered *Miranda* warnings to him[1], At the time Agent McDaniel commenced his interrogation, Fowler had neither initiated further conversation nor waived his previously asserted right to silence; the 'education' and interrogation ran far afoul of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981). Unlike *Harryman*, where the erroneously admitted statements were unrelated to his defense, the statements in the instant case went to the heart of Fowler's defense. The prosecutor noted those statements in her closing arguments, emphasized them in her rebuttal closing argument, and then told the jury that if he were innocent, he would have said so at the time of his arrest, "as an innocent person might be under those" circumstances. The Second Circuit in *United States v. Quiroz*, 13 F.3d 505 (2nd Cir. 1993) noted that "[o]ne indicator of the evidence's degree of importance is whether or not the prosecution has emphasized that evidence in its arguments to the jury." That court noted as well that the necessity of giving the jury an *Allen* charge indicated that the evidence was not overwhelming. *id* at 513.

Other than opining that the evidence was overwhelming, the government at no time has offered any explanation whatsoever to carry its burden of demonstrating that there is no reasonable possibility that the evidence and arguments could not possibly have contributed to the verdict obtained. If the court is to indeed examine the evidence in the context of the trial, it is necessary to consider all of the evidence, not just that in support of the verdict. After having deadlocked twice, the second time as to all defendants and all counts, it was necessary to send the jury back the second time with a modified *Allen* charge. The evidence was not overwhelming. The appropriate standard of review is not

[1] Fowler's prompt exculpatory interruption was the only admissible statement made by him at any time after his arrest. The government did not offer this statement into evidence, but instead misrepresented to the jury that he did not exculpate himself on arrest, "as an innocent person would have done."

a review of the sufficiency of the evidence that would require deference to the government; but of a constitutional violation that requires deference to the Fifth Amendment.

WHETHER THE ELEVENTH CIRCUIT'S FAILURE TO CONSIDER AND RULE APPROPRIATELY ON FOWLER'S ARGUMENT THAT HE WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE GOVERNMENT'S DOYLE VIOLATION CONFLICTS WITH DECISIONS OF THIS COURT.

The government's rebuttal argument, "[b]ut what did Mr. Fowler do when the police came in? There is no evidence that anyone present was just relieved and thrilled to see the police officers *as an innocent person* might be under those--" was improper. Further, the prosecutor knew there was evidence that Fowler made an exculpatory statement while Agent Booker was reading *Miranda*; thus she misrepresented that there was no evidence that he acted consistently with innocence. The critical aspect of the comment, however, is the substantial prejudice carried by allusion to a Fowler's post-arrest silence. The prosecutor effectively conveyed, and the conclusion was surely drawn, that if Fowler was innocent, he would have said so at the time of his arrest.

It cannot be disputed that a *Doyle* violation occurred. "The standard is strict; virtually any description of a defendant's silence following arrest and a Miranda warning will constitute a *Doyle* violation." *United States v. Shaw*, 701 F.2d 367, 382 (5th Cir. 1983);*see, e.g., Passman v. Blackburn*, 797 F.2d 1335, 1346 (5th Cir. 1986)(citing *Shaw)*; *United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986)(same). It is not an insignificant error. "The jury is likely to draw" a "strong negative inference" from the fact of a defendant's postarrest silence. *United*

States v. Hale, 422 U.S. 171, 180, 95 S.Ct. 2133, 2138, 45 L.Ed.2d 99 (1975).

The statements that were admitted in violation of *Miranda* were recapped and highlighted in closing arguments. The prosecutor placed dramatic and particular emphasis on them in her rebuttal closing argument, and then told the jury that if he were innocent, he would have said so at the time of his arrest, "as an innocent person might be under those" circumstances. Although the court declined to address the propriety of this classic *Doyle* violation, the intertwining of such an impermissible comment on post-arrest silence with the subsequent erroneously admitted statements could not but have had a significant impact on the jury.

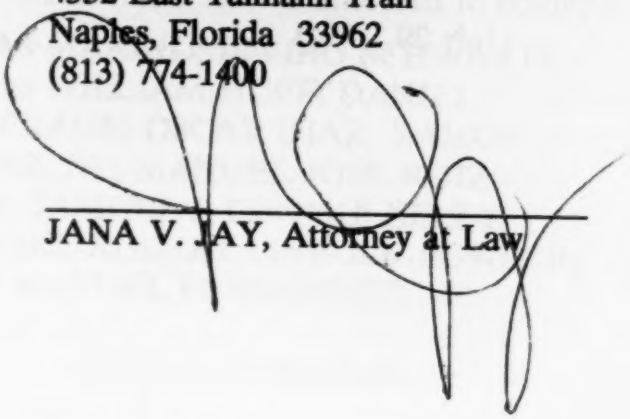
A *Doyle* violation is subject to the constitutional harmless error analysis. *United States v. Pena*, 897 F.2d 1075, 1082 (11th Cir. 1990). Given the error on error that occurred where Fowler's exculpation was misrepresented, while his inculpation was admitted in violation of *Miranda*, if the Eleventh Circuit had applied the constitutional harmless error analysis as articulated by this Court, the result would have been different. Because the Eleventh Circuit consistently applies a *Brecht*-like analysis on direct review, it is appropriate that the petition for a writ of certiorari be granted in this case.

CONCLUSION

For the foregoing reasons, Petitioner ROBERT LINCOLN FOWLER respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

DATED this 23 day of February, 1995.

Respectfully submitted,
OMNI LAW CHARTERED
4532 East Tamiami Trail
Naples, Florida 33962
(813) 774-1400



JANA V. JAY, Attorney at Law

INDEX TO APPENDIX

Page

Indictment
(April 19, 1990) ..... App. 1

Judgment and Sentence
(December 20, 1990) ..... App. 3

Opinion of Eleventh Circuit Court of Appeals
(July 29, 1994) ..... App. 5

[FILED APRIL 19, 1990]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CRIMINAL NO. 90-00052
USAO No. 90R0145

UNITED STATES OF AMERICA

v.

JOSEPH THOMAS MARINO; IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF; DANIEL LEE DEATHERAGE; OSCAR DIAZ; RAMON RODRIGUEZ, JR.; MANUEL JOSE RUIZ; AL PASTOR; SAMUEL J. DEGISO; KELLY FRED KALINOWSKI; ROBERT LINCOLN FOWLER; JESUS MANUEL FERNANDEZ;

Defendants.

INDICTMENT

The Grand Jury charges:

COUNT ONE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly,

and unlawfully combine, conspire, confederate, and agree together with each other, and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to wit:

> To knowingly and intentionally unlawfully distribute and possess with intent to distribute approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

It was part of said conspiracy that the defendants would themselves or through other persons at known and unknown times and places obtain, package, and distribute cocaine for sale; and that the aforenamed defendants themselves or through divers other persons would engage in negotiations about price for the cocaine with prospective purchasers for same, and would deliver he cocaine to places necessary for such transactions; all in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

COUNT TWO

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly, and unlawfully attempt to commit an offense against the United States, to wit:

> To knowingly and intentionally import approximately 1,000 kilograms of cocaine, a

Schedule II controlled substance, into the United States of America from Honduras, a place outside the United States of America, in violation of Title 21, United States Code, Section 952(a).

All in violation of Title 21, United States Code, Section 846 , and Title 18, United States Code, Section 2.

COUNT THREE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, and knowingly, combine, conspire, confederate and agree with other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States, to wit:

To knowingly and intentionally import approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, into the United States of America from Honduras, a place outside the United States of America, in violation of Title 21, United States Code, Section 952(a).

It was a part of the conspiracy that the defendants would themselves or through other persons contact certain individuals to obtain a source of supply for cocaine; that the defendants would themselves or through others contract with certain individuals to arrange for the

transportation of the cocaine from Honduras to the United States; that the defendants would themselves or through others meet with certain individuals to take delivery of the cocaine upon its arrival in the United States at a location upon which they had previously agreed; that the defendants would themselves or through others provide vehicles and personnel to take delivery of he cocaine; that the defendants would themselves or through others provide money to pay for he transportation of he cocaine from Honduras to the United States where the vehicles and personnel would then take delivery of he cocaine; all in violation of Title 2, United States Code, Section 963, and Title 18, United States Code, Section 2.

COUNT FOUR

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly, and unlawfully, attempt to commit an offense against he United States, to wit:

> To knowingly and intentionally possess with intent to distribute approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

COUNT FIVE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, knowingly and intentionally did unlawfully distribute and possess with intent to distribute approximately 500 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

/S/ REBECCA E. HAYES
FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

---------- - APRIL 1990
J.B. SESSIONS, III
UNITED STATES ATTORNEY

[FILED DECEMBER 20, 1990]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number Cr. 90-00052

UNITED STATES OF AMERICA

v.

ROBERT LINCOLN FOWLER

CHARLES G. WHITE
Defendant's Attorney

THE DEFENDANT:

was found guilty on count(s) 5 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 841(a)(1)	Distribute & possess with intent to distribute Schedule II controlled substance (cocaine)		5

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 1 & 4 and is discharged as to such counts.

It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 5, which shall be due immediately.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No: 266-94-1878

Defendant's Date of Birth: April 15, 1951

Defendant's Mailing Address: In Custody

Defendant's Residence Address:

Date of Imposition of Sentence December 19, 1990

Signature of Judicial Officer /s/

Name & Title of Judicial Officer Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE

Date DECEMBER 20, 1990

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED TWENTY-EIGHT (328) MONTHS WITHOUT PAROLE

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall not possess a firearm or destructive device.

Special conditions of the defendant's supervised release term are:

1.) That he not illegally possess any controlled substances.

2.) That he participate in a Drug Aftercare Program as & when directed to dos o by the U.S. Probation Office.

FINE

The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision.

This amount is the total of the fines imposed on individual counts, as follows:

$25,000.00 as to Count 5.

This fine plus any interest required shall be paid:

in installments according to the following schedule of payments: as & when directed by U.S. Probation Office. Within 30 days from this date, the U.S. Probation Office will submit to the U.S. Attorney a schedule for the payment of the imposed fine.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Oscar DIAZ,
Defendant-Appellant.

No. 90-7890.

United States Court of Appeals,
Eleventh Circuit

July 29, 1994.

Thirteen defendants were convicted in the United States District Court for the Southern District of Alabama, No. CR90-00052, Charles R. Butler, Jr., J., of offenses arising out of their participation in cocaine importation and distribution conspiracy, and they appealed. The Court of Appeals, Johnson, Senior Circuit Judge, held that: (1) limitation of defendants' cross-examination of customs agent did not violate confrontation clause; (2) limitation of defendants' introduction of government informant's deposition did not violate confrontation clause; (3) prosecutor's questions regarding statement of white defendant regarding black man did not warrant mistrial; (4) prosecutor's proffered reason for exercising peremptory strike against black venireperson was race-neutral; (5) any error in admitting first defendant's statement to customs agents was harmless; (6) denial of reduction in second defendant's sentence for acceptance of responsibility did not violate ex post facto clause; and (7) sentence of life imprisonment for third defendant did not violate Eighth Amendment.

Affirmed.

1. **Criminal Law -662.7**
Witnesses-350

District court did not violate confrontation clause or abuse its discretion by prohibiting cross-examination of customs agent regarding his state arrest for vehicular homicide and internal affairs investigation and civil action arising from that incident, notwithstanding defendants' contention that incident gave agent motive to testify favorably for government; agent's testimony was consistent with statement given prior to both creation of his notes and his arrest, incident was highly prejudicial, there was no evidence that government had ability to grant leniency in state actions against him, and defendants were allowed to delve into agent's credibility by inquiring if he had any reason to "curry favor" with government. U.S.C.A. Const. Amend. 6.

2. **Criminal Law - 661**

District court possesses discretionary power to rule on admissibility of evidence.

3. **Criminal Law - 662.7**

District court's discretion in limiting scope of cross-examination is subject to requirements of Sixth Amendment. U.S.C.A. Const.Amend. 6.

4. **Criminal Law - 662.7**

Defendant's right to cross-examine is not unlimited as once there is sufficient cross-examination to satisfy confrontation clause, further questioning is within district court's discretion. U.S.C.A. Const.Amend. 6

5. **Witnesses - 372(1)**

Mere fact that defendants seek to explore bias on part of prosecution witness does not automatically void court's ability to limit cross-examination. U.S.C.A. Const.Amend. 6.

6. Criminal Law - 627.2

District court could limit introduction of deposition of government informant, whom government declined to call as witness, prohibiting introduction of portions relating to informant's detention for possession of crack cocaine, notwithstanding defendants' contention that deposition demonstrated that customs agent lied in stating that he did not intervene in detention and showed that informant might be biased in favor of government' defendants were allowed to introduce portions of deposition deemed relevant for impeachment purposes, including informant's admission that he was paid government informant, and there were no significant inconsistencies between agent's and informant's descriptions of crack cocaine incident.

7. Criminal Law - 662.30

District court's refusal to allow defendants' to introduce entire deposition of government informant, whom government did not call as witness, including portions relating to his detention for possession of crack cocaine, did not violate confrontation clause; informant was not "vital witness," informant admitted that he was government informant, that he had been paid in past, that he received $12,000 in instant case, that he received $2,000 the day before his deposition, and that he spent time preparing for deposition with customs agents, and jury was aware that informant stood to receive $250,000, representing maximum award allowed to informants, and that whether he received that amount would be determined by superiors of customs agents involved in case. U.S.C.A. Const.Amend. 6.

8. Criminal Law - 662.7

Sixth Amendment is satisfied where sufficient information is elicited to allow jury to gauge adequately witness' credibility and to assess his motives or possible bias. U.S.C.A. Const.Amend. 6.

9. Criminal Law - 706(3)

Prosecutor's questions regarding white defendant's statement, using racial epithet, that only way to control black man was to beat him with a bat did not warrant mistrial; prosecutor immediately moved on to other points, and defendants declined court's offer to give curative instruction.

10. Criminal Law - 1158(3)

Court of Appeals gives great deference to district court's finding that government rebutted prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous.

11. Jury - 33(5.15)

Prosecutor's belief that black venireperson may have been related to defendant in earlier case she prosecuted did not justify peremptory challenge of that venireperson; record suggested that venireperson was unrelated to that defendant as venireperson did not affirmatively respond to court's inquiry to venire as to whether any family member had ever been involved in criminal matter in court.

12. Jury - 33(5.15)

Venireperson's inability to pay attention is proper race-neutral reason for using peremptory strike.

13. Jury - 33(5.15)

To allow meaningful appellate review of claim of discriminatory use of peremptory strike when strike is based on venireperson's demeanor, trial courts should fully develop record regarding specific behavior of venireperson that leads to peremptory strike and should verify that stricken venireperson's conduct was conspicuously different from that of other venirepersons.

14. Jury - 33(5.15)

Prosecutor's explanation for exercising peremptory strike against black venireperson was race-neutral; prosecutor stated that venireperson was generally inattentive during voir dire, directing her attention toward defendants and away from prosecution, and defendants did not dispute that behavior.

15. Criminal Law - 1169.12

Taking of defendant's statement in contravention of *Miranda* is subject to harmless error analysis; court examines effect erroneously admitted statement had upon other evidence introduced at trial and upon conduct of defense and, if, absent statement, remaining evidence is so overwhelming as to establish guilt beyond reasonable doubt, admission of statement is harmless.

16. Criminal Law - 1169.12

Any error in admitting defendant's statement, which was made after alleged invocation of his *Miranda* rights, was harmless error, given overwhelming strength of evidence against defendant on drug conspiracy charges; customs agent testified that codefendant told him that automobile with secret compartment would be used to load and transport cocaine, government introduced photographs

showing automobile's secret compartment, customs agents testified that defendant was present at drug transaction and spent much time under automobile and that they overheard defendant telling codefendant that he needed tools and flashlight to open compartment, and customs agent testified that defendant told him that compartment held 60 kilograms of cocaine.

17. Criminal Law - 1239

Sentencing Guidelines commentary is authoritative unless its interpretation violates law or is erroneous reading of guidelines. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App.

18. Constitutional Law - 203

Criminal Law - 1233

Where amendments to Sentencing Guidelines commentary do not overrule prior construction, but, rather, serve to confirm Court of Appeals' reading of guideline section, ex post facto concerns are not implicated. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App; U.S.C.A. Const. Art 1 §9, cl. 3.

19. Criminal Law - 1139

District court's application of Sentencing Guidelines is subject to de novo review. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App.

20. Constitutional Law - 203

Criminal Law - 1252

Denial of reduction in defendant's sentence for acceptance of responsibility, based on amendment to

commentary regarding reduction when defendant exercised right to trial, did not violate ex post facto clause; commentary did not overrule prior construction, but, rather, accorded with Court of Appeals' prior reading of section. U.S.S.G. §3E1.1, comment. (n.2.), 18 U.S.C.A.App; U.S.C.A. Const. Art. 1, §9, cl. 3.

21. Criminal Law - 1213.8(3, 6)

Life sentence imposed on defendant convicted on charges arising from cocaine distribution conspiracy did not violate Eighth Amendment, notwithstanding contention that district court mechanically applied guidelines and did not appreciate that defendant did not possess intent or ability to distribute cocaine and that he could not have distributed it as it was government owned and controlled; court sentenced defendant and each of his 12 codefendant individually, and record supported amount of drugs attributed to defendant. U.S.C.A. Const.Amend. 8.

Appeal from the United States District Court for the Southern District of Alabama.

Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN*[2], Senior District Judge.

JOHNSON, Senior District Judge:

Defendant-appellant Oscar Diaz and twelve co-

5
3.6

[2] Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

defendants ("Appellants") [1] appeal various aspects of their convictions and sentences arising out of their participation in a cocaine importation and distribution conspiracy. After due consideration, we affirm Appellants' convictions sentences.

I. STATEMENT OF THE CASE

A. *Background Facts*

1. The drug deal

On March 7, 1990, informant Ellis McKenzie informed Customs Agent Lawrence Winberg that appellant Billy Allen and others were involved with narcotics. McKenzie gave Agent Winberg Allen's telephone number. Winberg then contacted Allen, identifying himself as a Colombian drug dealer. As a result of these conversations and ensuing negotiations, Winberg and other undercover agents went to Miami, Florida to meed with Allen and some of his fellow conspirators.

On March 25, 1990, Agent Winberg, Agent James Tanner, and McKenzie met with Allen and appellant Dudson Woods at the Sofitel Hotel to discuss their cocaine deal. Agent Tanner testified that he overheard a conversation between Allen and McKenzie in which Allen mentioned a previous cocaine trip to Honduras and stated how rich they would become at the conclusion of the drug transaction. The next day Allen introduced Agent Tanner and Agent Kyle Barnette to appellant Joseph Marino.

[1] The other appellants are Jose Manuel Ruiz (sic), Jesus Manuel Fernandez, Al Pastor, Billy Allen, Dudson Woods, Daniel Lee Deatherage, Kelly Fred Kalinowski, Irwin Schwartz, Ramon Rodriguez, Jr., Robert Lincoln Fowler, Joseph Thomas Marino, and Samuel J. Degiso.

Later that day, Winberg, Barnette, and Tanner met with Fabio deChristofaro and appellants Samuel DeGiso, Irving Schwartz, Allen, Woods, and Marino. At this meeting, videotaped by the government, Schwartz told Winberg that he could transport the cocaine using a specially prepared airplane. Agent Winberg stated that he would supply his own transportation, whereupon Schwartz offered to buy 1,000 kilograms of cocaine for $10,000--$12,000 per kilogram. They agreed that Schwartz would pay $250,000 "earnest money" in the United States.

At a videotaped meeting on March 27, 1990, attended by Winberg, Tanner, Barnette, McKenzie, Schwartz, Marino, Andy Schell, and Larry Feder, Schwartz stated that he wanted a long-term deal. Following the meeting, surveillance units photographed Marino, Schwartz, Feder, and Schell talking in the parking lot. These units later photographed Marino meeting with appellant Dan Deatherage. Winberg subsequently informed Allen and Woods about the meeting and told them that he would go to Honduras to work out the deal in early April.

In early April of 1990, Agents Winberg and Barnette met Schwartz at a Hilton Hotel in Pensacola, Florida to discuss the logistics of the cocaine deal. Schwartz told them that : (1) the cocaine would be sold in the Northeast; (2) he had a good organization; and (3) his people were "prepared to die." Subsequently, it was arranged for Agent Winberg to meet with Schwartz and Marino in Mobile, Alabama to receive the $250,000 earnest money. The parties agreed that Schwartz or Marino would remain with Winberg until payment of the balance on the cocaine.

On April 10, 1990, the Customs Service in New Orleans, Louisiana detained McKenzie as he tried to enter the United States from Honduras. Customs agents

stopped McKenzie because he had crack cocaine on his person. Winberg went to New Orleans and met with McKenzie, who was released.

On April 14, 1990, Marino called Winberg to tell him he was at a hotel in Baldwin County, Alabama. Two days later, Winberg and Barnette met with Schwartz at the hotel to receive the earnest money. Feder, Marino, and Deatherage were also present.

On April 17, Agents Winberg, Barnette, and Mike Ciaurro met Schwartz to discuss delivering the cocaine in Baldwin County, Alabama. Because Schwartz told the agents that he wanted to see the cocaine, Winberg and Ciaurro accompanied Deatherage to view the cocaine.[2] When shown the cocaine, Deatherage snorted some. The delivery was then set for the next day.

In the morning of April 18. 1990, Marino met with Agents Winberg, Barnette and Ciaurro, telling them that Schwartz and Deatherage had gone to meet the drivers. Barnette then left to prepare the delivery site. Marino also told the agents that (1) he, Schwartz, Schell, and Feder put up the money for the cocaine and (2) that Mannie (appellant Jose Manuel Ruiz[sic]) was in charge of transportation. Marino then offered to stay in Alabama until the balance of the money was paid.

As arranged, Schwartz, Deatherage, and Agents Barnette and Tanner rendezvoused with the drivers. At the rendezvous site, Schwartz told the agents that he would be using two trucks and a Nissan automobile to transport the drugs--each truck would hold 250 kilograms with the

[2] The cocaine was not actually from Honduras but was instead from the government's supply of previously confiscated cocaine.

Nissan carrying sixty kilograms in a secret compartment. Schwartz introduced appellants Deatherage and Kelly Kalinowski as "his guys." He then instructed everybody to go to the loading site, a barn in Baldwin County, while he returned to the hotel. At the loading site, agent Keith Barnette observed appellants Oscar Diaz and Jesus Fernandez working as part of Schwartz's loading and transportation crew. Diaz told Keith Barnette that the cocaine would be hidden in the truck's sleeper compartment. As the cocaine was being loaded, several agents[3] observed Deatherage and Ruiz counting the bags. Agent Tanner overheard Ruiz telling Deatherage to verify the count because any shortfall would come out of their pockets. Assisting in the unloading were appellants Degiso, Kalinowski, Fernandez, Ramon Rodriguez, and Al Pastor. Agents observed Diaz loading the sleeper compartment and overheard a conversation between him and Rodriguez in which each thought that the other had been counting. Ruiz was then heard telling them that they were partners and had better get it straight. Diaz then began using a calculator.

Meanwhile, appellant Robert Fowler asked one of the agents if he could cover the floor because he was going to open the Nissan's secret compartment beneath the vehicle and did not want to get dirty. As Fowler got under the Nissan, he told agents that it would hold sixty kilograms. Fowler also told agents that he did not know how to open the compartment because he had never before used it. Fowler asked for various tools, but Fernandez told him that none were available.

Once the cocaine was loaded, the men were

---

[3] A number of agents were in the barn, pretending to be part of Winberg's Colombian drug gang.

arrested. Schwartz and Marino were arrested at their hotel. Woods and Allen were arrested in Miami on April 22, 1990. In a post-arrest statement, Woods admitted working for Feder and telling Feder that he could obtain cocaine from McKenzie.

2. Schell's testimony

Andy Schell testified for the government. He identified "Mannie" as appellant Manuel Ruiz and admitted being involved in the drug business with Schwartz, Marino, and Ruiz. Schell testified that after meeting Schwartz and Marino, he began buying cocaine from Schwartz, Marino, and Deatherage and that Feder later became involved. Schell also testified that, at Schwartz's request, he raised $70,000 for the deal with Agent Winberg. Schell identified Deatherage, Woods, and Allen as Schwartz's partners.

B. *Procedural History*

On April 19, 1990, Marino, Schwartz, Deatherage, Degiso, Ruiz, Diaz, Rodriguez, Pastor, Kalinowski, Fowler, and Fernandez were indicted in a five-count indictment charging them with (I) conspiracy to possess with intent to distribute cocaine, (II) attempt to import cocaine, (III) conspiracy to import cocaine, (IV) attempt to possess cocaine with intent to distribute, and (V) possession of cocaine with intent to distribute. A separate but identical indictment was issued against Allen and Woods. The two cases were then consolidated.

The trial began September 19, 1990 and lasted approximately two and one-half weeks. During the trial, the court granted judgment of acquittal motions in favor of Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler on Counts II and III. Following the giving of an *Allen* charge, Marino, Schwartz, Degiso, Allen, Deatherage, Woods, and Ruiz were convicted of Counts I, III, and V

and found not guilty on Counts II and IV. In addition, Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler were convicted on Count V and acquitted on Counts I and IV. Appellants were sentenced to lengthy prison terms.

II. ANALYSIS

Among them, Appellants raise multiple issues concerning alleged errors at trial and sentencing.[4] We address below only those issues having merit, specifically whether: (1) the district court abused its discretion in restricting cross-examination of Agent Keith Barnette or informant McKenzie; (2) the prosecutor impermissibly injected race into the trial; (3) the prosecutor struck a venireperson based on race; (4) the court erred in admitting post-arrest statements of Fowler; and (5) Appellants' sentences violate either the ex Post Facto Clause or the Eighth Amendment.[5]

A. Limitations on Cross-Examination

1. Agent Barnette

---

[4] We note that not all Appellants join in each claim. Nonetheless for the sake of convenience, we will refer to Appellants when discussing each claim.

[5] Having carefully studied the record, we find that *all* other issues raised by Appellants are without merit. Accordingly, further discussion is not warranted with regard to Appellants' claims concerning (1) various acts of alleged prosecutorial misconduct, (2) suppression motions, (3) the completeness of the trial transcript, (4) double jeopardy, (5) peremptory challenges, (6) the admission of Deatherage's other crimes and certain statements made by Marino, (7) the *Allen* charge, (8) violations of the Jencks Act, (9) the sufficiency of the evidence, and (10) Winberg's cross-examination.

[1] Shortly after Appellants were arrested, Agent Keith Barnette was arrested and charged by Alabama authorities with vehicular homicide committed while on duty.[6] At trial, Appellants sought to question Barnette regarding the arrest and discrepancies between his testimony and his rough notes, prepared one week after the arrest. Appellants proffered that they would impeach Barnette by showing that he had changed his testimony as a result of the arrest in the hopes of receiving leniency in his pending criminal case and/or assistance in any civil actions against him. However, the government filed a motion in limine to prevent defense counsel from examining Barnette concerning the vehicular homicide action. In granting the government's motion, the district court held that so long as Barnette's testimony was consistent with his rough notes, which had previously been turned over to Appellants, Appellants could not question Barnette about the accident or pending action against him.

On direct examination, Barnette testified that Diaz had spoken to him regarding the "count" on the cocaine and had used a calculator to add the cocaine packages. On cross-examination, Barnette admitted that his notes did not reflect the conversation or Diaz's use of a calculator. Appellants then asked Barnette whether there had "been new developments in your life that might cause you to want to curry favor with the United States Government prosecutors and customs agents and other law enforcement agents in this case." Barnette answered in the negative. Asked the same question a second time by the court, Barnette again denied having any reason to "curry favor." Appellants then moved to pursue further this line of

---

[6] At the time that Barnette testified, he performed only administrative duties pending the results of an internal affairs investigation. A civil action was also instituted against him.

questioning, which was denied.

Appellants next asked whether Barnette was under investigation by the Internal Affairs of the Customs Service and no longer on active duty. The court sustained the government's objections before Barnette answered either question. However, Barnette did answer "yes" in response to Appellants' question if he would lose his job if he committed perjury. On redirect, Barnette testified that the day after Appellants' arrest and prior to creating his notes, he told the U.S. Attorney's Office about the conversation with diaz and about Diaz's use of a calculator. After the government concluded its case-in-chief, defense counsel recalled the witness and attempted to establish its proffer. As before, Barnette denied being biased or motivated on behalf of the government. Consequently, the court maintained its prior ruling prohibiting examination into the vehicular homicide action. On appeal, Appellants claim that restricting Barnette's cross-examination was error. We disagree.

[2-4] Although the district court possesses discretionary power to rule on the admissibility of evidence, *United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir.), *cert. denied*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1994), its discretion in limiting the scope of cross-examination is subject to the requirements of the Sixth Amendment. *Id: United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).[7] The right to cross-examine is not unlimited, however, because once there is sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the district court's discretion.

---

[7] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., sixth amend.

United States v. Taylor, 17 F.3d 333, 340-41 (11th Cir. 1994). "The test for the Confrontation Clause is whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Id.* (quoting *Garcia*, 13 F.3d at 1469).

[5] Appellants wished to question Barnette about the state court indictment, hypothesizing that it gave him motive to testify favorably for the government in the hopes that he would receive leniency or assistance as to the homicide action. Appellants rely on *Greene v. Wainwright*, 634 F.2d 272, 275-76 (5th Cir. 1981) for the proposition that because they were attempting to show bias on the part of a prosecution witness, Barnette, the limitation on cross-examination was unconstitutional. Nonetheless, the mere fact that Appellants sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination. It is axiomatic that the right to cross-examination is not absolute because "the information sought to be elicited must be relevant." *Haber v. Wainwright*, 756 F.2d 1520, 1522 (11th Cir. 1985).

Here, Barnette's testimony was consistent with statements given prior to both the creation of his notes and his arrest. Barnette's testimony simply parroted statements made at a time when he had no special incentive to seek the government's help. Because of the highly prejudicial nature of the arrest, the court properly handled the cross-examination by limiting inquiry into the accident as long as Barnette's testimony did not deviate from his notes and prior statements. The fact that his testimony was entirely consistent with these prior statements demonstrates that Barnette was not shading his testimony in an effort to gain leniency on his state court case. Moreover, we note that there is no evidence in the record showing that the government had the ability to grant leniency in Barnette's

Alabama action.[8] In light of these circumstances, we fail to see how the limitation on cross-examination constituted an abuse of discretion or violated the Sixth Amendment. *See United States v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990) (barring defendant from exploring government witness' state law indictment did not violate Sixth Amendment as there was no evidence the government could influence the state court proceedings, and the existence of a pending state court indictment on charges totally unrelated to the testimony offered in the case did not give the witness a substantial reason to cooperate with the government). Finally, Appellants were able to delve into Barnette's credibility, albeit in a limited fashion, by inquiring if he had any reason to "curry favor" with the government. Thus, the district court did not abuse its discretion by limiting Appellants' cross-examination of Barnette.

2. Informant Ellis McKenzie

At trial, the government declined to call McKenzie as a witness. Instead, Appellants introduced McKenzie's testimony via a pre-trial deposition. Appellants planned to use the deposition to show that Winberg lied in stating that he had not intervened and assisted McKenzie when McKenzie was detained for possession of crack cocaine in New Orleans. Additionally, Appellants sought to demonstrate that McKenzie might be biased in favor of the

---

[8] Appellants' reliance on *Lankford* is misplaced inasmuch as *Lankford* involved a witness' possible motive to cooperate with the government in order to (1) "protect his sons," (2) "obtain general assistance in avoiding a subsequent federal prosecution against them," and (3) "solicit help [from the] federal government in his sons' state case." 955 F.2d at 1549. The facts in this case are substantially different.

government to prevent criminal charges being brought concerning the New Orleans crack incident. The district court refused to allow Appellants to introduce the entire deposition, allowing only those portions that it deemed relevant for impeachment purposes. Thus, Appellants were prohibited from introducing McKenzie's testimony about his detention in New Orleans. However, the court did permit Appellants to introduce portions of the transcript in which McKenzie admitted being a paid government informant. Appellants claim that the court's limitation violated their Sixth Amendment confrontation rights and constituted reversible error. We disagree.

[6] The court did not err by refusing to allow Appellants to enter either those portions of McKenzie's deposition involving the New Orleans incident or the deposition *in toto*. *See United States v. Thompson*, 976 F.2d 666, 671 (11th Cir. 1992)(introduction of complete medical records unwarranted where they were not as a whole probative of witness' credibility; only those portions inconsistent with witness' trial testimony were probative and could be used for impeachment), *cert. denied*,--- U.S. ---, 113 S.Ct. 3010, 125 L.Ed.2d 701 (1993). Furthermore, a review of the record demonstrates no significant inconsistencies between Winberg's and McKenzie's descriptions of the New Orleans crack incident. Accordingly, the district court did not err in limiting the impeachment uses of McKenzie's deposition.

[7, 8] We find that Appellants' Sixth Amendment claims similarly lack substance. Although Appellants wanted to probe deeply into McKenzie's background, the Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his motives or possible bias. *United States v. Burke*, 738 F.2d 1225, 1227-8 (11th Cir. 1984) (sufficient information elicited where jury knows a witness has been granted immunity, participated in the

witness protection program, and received money from the government). For example, in *United States v. Kopituk*, we held that a court does not abuse its discretion by limiting cross-examination of the government's "most vital" witness where the jury knows that the witness has an agreement with the government to testify in exchange for a lenient plea arrangement on pending charges. 690 F.2d 1289, 1337 (11th Cir. 1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2089, 2090, 77 L.Ed.2d 300 (1983).

Here, analogous information was presented to the jury. McKenzie, who can in no way be termed a "vital witness," admitted that he was a government informant, that he had been paid money in the past, and that he had received $12,000 in this case. He also testified that he had received $2,000 the day before his deposition and that he spent time preparing for his deposition in the company of Agents Kyle Barnette and Dwight McDaniel. The jury also knew that McKenzie stood to receive $250,000, representing the maximum award allowed to informants. Finally, the jury was aware that whether McKenzie actually received the $250,000 would be determined by Winberg's superiors. Under these circumstances, no further bias would have been exposed by investigation into McKenzie's character of the events surrounding his New Orleans detention. *United States v. Alonso*, 740 F.2d 862, 874 (11th Cir. 1984)(court properly prohibited inquiry into facts concerning witness' arrest; defendants were allowed to ask if witness made a deal with government or expected a benefit for testifying), *cert. denied*, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939 (1985).[9]

---

[9] Given the overwhelming evidence presented against each appellant, even if we were to conclude that McKenzie's cross-examination had erroneously been limited, the error would have been harmless. *See Grizzell v. Wainwright*, 692 F.2d 722, 726 (11th Cir. 1982) (no "reasonable probability" that verdict was affected by the error), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307

B. Racial Comments

[9] Appellants claim that the prosecutor impermissibly injected race into the case during the redirect of Schell wherein the following exchange occurred:

> PROSECUTOR: You responded to some questions related to pressure from Mr. Schwartz and Mr. Marino about money that was owed, do you recall those questions?
>
> SCHELL: Yes.
>
> PROSECUTOR: What type of pressure, if any, was applied to you for collection for money?
>
> SCHELL: Mr. Marino, not Mr. Schwartz. He had told me that I couldn't control Struder and that the only way to control him was to take a bat to him. He used other words but that was the jist [sic] of it.
>
> DEFENSE COUNSEL: I object to the conclusion of remarks as to what he considers the jist [sic] of something said to him and ask that last statement be stricken.
>
> THE COURT: I am not sure I understand your last answer, without giving any undue....
>
> SCHELL: Okay. Struder--he told me that he wanted to go to Struder's house and that *the only way to control a nigger was to beat him with a bat.*
>
> THE COURT: Overrule your objection.

PROSECUTOR: Were those Mr. Marino's exact words?

SCHELL: Yes.

PROSECUTOR: *Is Mr. Struder a black man?*

DEFENSE COUNSEL: Judge, I object. That is absolutely immaterial and irrelevant in regard to this.

THE COURT: Overruled.

(emphasis supplied).

Schell did not answer the prosecutor's question as the prosecutor immediately moved onto other points. At a bench conference following this examination, Appellants moved for a mistrial, alleging that the government was attempting to inflame the black jurors against the white Appellants. The district court denied the motion. Appellants declined the court's offer to give a curative instruction.

While this Court is ever-vigilant regarding the improper injection of race into criminal trials, the prosecutor's statements do not constitute an improper appeal to race. Thus, we do not believe that a mistrial was warranted. *See Willis v. Kemp*, 838 F.2d 1510, 1522-23 (11th Cir. 1988)(although improper, prosecutor's question of black defendant as to whether he referred to his white victim as a "honkey" was not grounds for granting a mistrial), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989); *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir.) (government's eliciting from a witness that one of two white defendants on trial for mail fraud had referred to a victim of their scheme as a "poor black bastard" was not an appeal to racial prejudice), *cert. denied*,

436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978). *See also united States v. Hernandez*, 865 F.2d 925, 927-28 (7th Cir. 1989)(prosecutor's improper closing remark to "send clear message to Cuban drug dealers was not so inflammatory as to prejudice Cuban defendant).

C. Strike of Venireperson

At trial, the prosecutor exercised peremptory strikes to remove three black persons from the jury. Appellants assert that one of these challenges, that of venireperson Portis, violated the Constitution's equal protection guarantee because it was racially motivated. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Without finding that Appellants had established a prima facie case of discrimination, the district court asked the prosecutor to articulate the reasons underpinning the strikes. The prosecutor responded that she struck Portis because (1) she believed that Portis may have been related to a defendant whom she had formerly prosecuted and (2) Portis was generally inattentive during the voir dire, focusing on the defense table during jury selection. The court upheld the strike of Portis.

[10-12] We give great deference to a district court's finding that the government rebutted a prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous. *United States v. Cure*, 996 F.2d 1136, 1138 (11th Cir.1993), *cert denied*, ___ U.S. ___, 114 S.Ct. 1075, 127 L.Ed.2d 393 (1994). Given that the court asked the prosecutor to explain her strikes of the black venirepersons, we shall assume that Appellants met the requirements of a prima facie case and therefore proceed directly to determining whether the prosecutor's reasons for striking Portis were race-neutral. The prosecutor's belief that the venireperson may have been related to a defendant in an earlier case did not justify the challenge. The record suggests that the venireperson was

unrelated to that defendant as Portis did not affirmatively respond to the court's inquiry to the venire whether any family member had ever been involved in a criminal matter in court. Nonetheless, a venireperson's inability to pay attention is a proper race-neutral reason for using a peremptory strike. *See United States v. Hendrieth*, 922 F.2d 748, 749-50 (11th Cir. 1991)(per curiam)(upholding trial court's decision to allow a strike based upon a juror's inattentiveness and her rolling and rubbing her eyes during voir dire).

[13] Explanations based upon a juror's demeanor are, however, difficult to confirm on appeal because the transcripts that comprise the record before the Court do not portray the unacceptable behavior. Moreover, such explanations are particularly susceptible to the kind of abuse prohibited by *Batson* . Consequently, to allow meaningful appellate review, trial judges should fully develop the record regarding the specific behavior by a venireperson that leads to a peremptory strike and should verify that the stricken venireperson's conduct was conspicuously different from that of the other venirepersons. *See United States v. Cooper*, 19 F.3d 1154, 1161 (7th Cir.1994) (upholding demeanor-based strikes in part because trial judge noted on record that, based on his own observations, the prosecutor's interpretations were reasonable); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U.MICH J.L.REF. 229, 246-50, 266-67 (1993) (arguing that courts should reject demeanor-based explanations that cannot be confirmed by the record).

[14] In this case, Appellants do not dispute that Portis directed her attention toward the defendants, away from the prosecution, during jury selection, allowing us to infer that Portis' behavior was different from the other venirepersons. *Cf. Cure*, 996 F.2d at 1138-39 (defense counsel's failure to offer contrary description of

venireperson's demeanor militates against reversal). Accordingly, the district court did not clearly err by finding that the prosecutor offered a race-neutral reason for striking Portis from the jury.

D. Robert Fowler's Post-Arrest Statement

Following the receipt of his *Miranda* rights at the barn, Fowler was asked if he wanted to waive his rights. He responded by shaking his head. He was then taken to jail. Some four hours after his arrival, agents brought him to an interview room where Agent McDaniel told Fowler the charges against him and that he would be tried in Alabama. Agent McDaniel then asked other agents present in the interview room if Fowler had been "Mirandized." Thinking that Fowler might not understand the term "Mirandized," McDaniel notified Fowler that he had a right to an attorney and a right not to speak to the agents. Fowler acknowledged that he was aware of his *Miranda* rights. McDaniel then asked him if he wished to cooperate. At trial, McDaniel testified that Fowler responded by saying that he could not cooperate, he did not know anything or anybody, he was paid to be "blank," and he was simply a chauffeur driving someone from Miami. McDaniel further testified that when he questioned Fowler about $500 that Fowler possessed when arrested, Fowler stated that he would rather not say who paid him and that he was sorry he had gotten greedy. Fowler then asked for an attorney and questioning ceased. The court denied Fowler's motion to suppress these statement.

[15] On appeal, Fowler contends that the denial of his suppression motion was error because he had unequivocally invoked his *Miranda* rights. Assuming, without deciding, that Fowler is correct, the taking of his statements in contravention of *Miranda* is subject to the harmless error analysis. *United States v. Beale*, 921 F.2d

1412, 1435 (11th Cir.), *cert. denied*, — U.S. —, 112 S.ct. 100, 116, L.Ed.2d 71 (1991); *United States v. Pena*, 897 F.2d 1075, 1082 (11th Cir. 1990). Our inquiry is two-fold. First, we examine the effect the erroneously admitted statement had upon other evidence introduced at trial and upon the conduct of the defense. *Beale*, 921 F.2d at 1435. Second, if, absent the illegal statement, the remaining evidence is so overwhelming to establish guilt beyond a reasonable doubt, admission of the statement is harmless. *Id.*

[16] At trial, Agent Tanner testified that Schwartz told him that a Nissan automobile with a secret compartment in its underbelly capable of storing sixty kilograms of cocaine would be one of the vehicles used to load and transport the drugs. The government introduced photographs showing the Nissan's secret compartment at trial. It is uncontroverted that Fowler was present at the barn and that he spent much time there under the Nissan. Agents Lamplaugh, Tanner, and Keith Barnette testified that at the barn Fowler expressly told them that he was attempting to open the Nissan's hidden compartment. Agents Lamplaugh and Tanner also testified that they overheard Fowler telling other appellants that he needed tools and a flashlight to open the compartment. Additionally, Agent Lamplaugh testified that Fowler told him that the compartment held sixty kilograms of cocaine. Given the overwhelming strength of this evidence, we conclude that the admission of Fowler's post-arrest statements was harmless error.

E. Sentencing Issues

1. Ex Post Facto Violation

[17] To avoid ex post facto problems, we have held that a defendant is to be sentenced under the Guidelines and commentary in effect on the date of sentencing unless

a more lenient punishment would occur under the Guidelines' version in effect on the date the offense was committed. *United States v. Wilson*, 993 F.2d 214, 216 (11th Cir.1993). Furthermore, Guideline commentary is authoritative unless its interpretation violates the law or is an erroneous reading of the Guidelines. *Stinson v. United States*, --- U.S. ---, ---, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

[18] Ruiz claims that an ex post facto violation occurred when the district court refused to give him an acceptance of responsibility reduction based on commentary that took effect *after* he was convicted but *before* he was sentenced. Although "application of an intervening Guideline interpretation by commentary promulgated after the offense could run afoul of the Ex Post Facto Clause," *United States v. Carroll*, 6 F.3d 735, 746 n.9 (11th Cir.1993), *cert. denied*, --- U.S. ---, 114 S.Ct. 1234, 127 L.Ed.2d 577 (1994), we are not confronted with such a situation. Where, as here, the amendments do not overrule prior construction but instead serve to confirm our reading of the Guideline section, ex post factor concerns are not implicated. *Id.*

[19] Prior to Ruiz's sentencing, the Guidelines stated:

> Conviction by trial does not preclude a defendant from consideration [for receiving an acceptance of responsibility reduction.] A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

U.S.S.G. §3E1.1 comment. (n.2) (Nov. 1989). The revised commentary that the court applied at sentencing provides

> "the acceptance of responsibility reduction is not intended to apply to a defendant who puts the government to the burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

U.S.S.g. §3E1.1 comment. (n.2) (Nov. 1990). The district court's application of the sentencing Guidelines is subject to *de novo* review. *United States v. Rodriguez*, 959 F.2d 193, 195 (11th Cir.), *cert. denied*, ---U.S.---, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

[20] We have previously held that entry of a not guilty plea and insistence upon a trial are factors that may be considered in determining whether a defendant has accepted responsibility for his crime. *United States v. Castillo-Valencia*, 917 F.2d 494, 501 (11th Cir. 1990) (holding that decision to go to trial may not be used to bar categorically an acceptance of responsibility reduction), *cert. denied*, 499 U.S. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253

(1991). Moreover, we have also recognized that a defendant who exercised his right to trial may diminish his chance of being granted the acceptance of responsibility reduction as there is less evidence of acceptance to weigh in his favor. *Rodriguez*, 959 F.2d at 197. Thus, the revised commentary relied on by the district court does not overrule §3E1.1 but instead accords with our reading of the section. In such cases, the Ex Post Facto Clause is not implicated. Thus, this claim fails. *Cf. Carroll*, 6 F.3d at 746 n. 9 (no ex post facto concerns where Guideline amendment regarding definition of a drug does not overrule prior constructions of the Guideline but instead confirms our reading of the Guideline).

2. Eighth Amendment

[21] Schwartz claims that his life sentence violates the Eighth Amendment. According to Schwartz, the district court erred by mechanically applying the guidelines and failing to appreciate that Schwartz did not possess the intent or the ability to purchase the cocaine, and that he could not have distributed it in any event as it was government owed and controlled. Schwartz thus asserts that his sentence is so unjust and harsh as to violate the Eighth Amendment. W reject Schwartz's claim. A review of the record indicates that the court sentenced each Appellant individually. Moreover, even assuming that the court failed to make individualized findings, the sentence may nonetheless be upheld where, as here, the record supports the amount of drugs attributed to the defendant. *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). Because the amount of drugs attributed to Schwartz was proper, his life sentence is neither cruel nor unusual. *See United States v. Willis*, 956 F.2d 248, 251 (11th Cir. 1992) (Guidelines do no violate Eighth Amendment).

III. CONCLUSION

Appellants' sentences and convictions are AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to the Office of the Solicitor General, Washington, D.C.; Gloria Bedwell, Assistant United States Attorney, 169 Dauphin Street, Mobile, Alabama 36602, and to counsel listed below, this 24 day of February, 1995.

JANA V. JAY, Attorney at Law

Robert G. Levitt, Esquire
Ogden Street Law Office
Denver, Colorado

Domingo Soto, Esquire
465 Dauphin Street
Mobile, AL 36602

John Furman, Esquire
P.O. Box 49
Mobile, AL 36601

John Thornton, Esquire
3430 S.E. Financial Center
Miami, FL 33131

Joel Hirschhorn, Esquire
2600 Douglas Road PH-1
Coral Gables, FL 33134

G. Richard Strafer, Esquire
2400 S. Dixie Highway
Miami, FL 33133